IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	DIVISION ONE
Appellant, Cross-Respondent,	)	No. 61064-3-I
v.	)	UNPUBLISHED OPINION
TIMOTHY RALPH SLATTERY,	)	
Respondent, Cross-Appellant.	)	FILED: May 18, 2009

Dwyer, A.C.J. — Timothy Slattery was convicted of malicious mischief in the first degree after witnesses testified that they saw him break the windows of a bus stop shelter in the Fremont neighborhood of Seattle. The trial court imposed a mitigated exceptional sentence, concluding that because Slattery's four prior felony convictions only resulted in a single criminal judgment, and because of the "relatively small" dollar value of the property damage, the "multiple offense policy of RCW 9.94A.589" resulted in a standard sentence range that was "clearly excessive." The State appeals, contending that the exceptional sentence was based on unsupported factual findings and an erroneous reading of the law. Slattery cross-appeals, contending that the trial

court improperly commented on the evidence, that his trial counsel was unconstitutionally ineffective, that the prosecutor engaged in misconduct, and that his offender score was incorrectly calculated at sentencing. We conclude that Slattery's contentions are without merit, but agree with the State that the trial court's justifications for the imposition of an exceptional sentence were factually unsupported and a misapplication of the multiple offense policy of RCW 9.94A.589. Accordingly, we affirm Slattery's conviction, but remand for resentencing.

I

In the early morning hours of November 15, 2007, Jennylee Lieseki heard loud thudding and crashing noises coming from the street below her closed condominium apartment window. She went to the window, where she saw a man moving around a glass-windowed bus stop shelter below. She then heard another crash and saw something hit the glass of the shelter, spider-webbing it with cracks. The man then walked out from behind the shelter, briefly paced around, and leaned on a nearby tree.

Lieseki had an unobscured view. The man was wearing a long-sleeved shirt and pants, and a knit cap that Lieseki described as being of a "neutral color, not extremely light but not very dark."

The man then picked up a softball-sized object lying on the ground and threw it at the bus shelter five or six times, hard, from a distance of about five feet, causing more loud crashing noises. The man then briefly walked back and

forth in the area, never leaving Lieseki's line of sight. While he was walking back and forth, Lieseki telephoned the police.

The police arrived shortly thereafter and began talking to the man while Lieseki watched. At this point, Lieseki left her apartment and walked down to the street. She then informed the police officer that the man to whom he was speaking was the man that she had seen vandalizing the bus shelter. The man was Slattery. He was arrested and charged with malicious mischief in the first degree.

Another witness, Erin Snow, also testified. She lived just up the street from Lieseki. Like Lieseki, in the early morning hours of November 15, 2007, she was awakened from sleep by noises that she described as "loud banging." After walking outside to investigate, she noticed a young man vandalizing the bus shelter while wearing "a light-colored stocking cap and . . . dark pants."

After the close of the State's case, Slattery's attorney informed the trial court that, "Mr. Slattery's mother came in this morning and said this is the hat he was wearing when he was released from jail on this case. I would intend to introduce it. There's been testimony about a light-colored stocking cap. Mr. Slattery would by offer of proof say this is the hat that he had on and I would be moving to introduce this through Mr. Slattery." Counsel then presented to the court a mid-green-colored stocking cap with a black stripe approximately two inches from the brow, banded on either side by narrow white stripes. The hat had not previously been disclosed as evidence. The State objected to its

introduction. Threatening to withdraw if the court refused to allow Slattery to testify that he had been wearing the hat, and asserting that she had had no legitimate basis for failing to investigate the clothing that Slattery had been wearing when he was arrested, Slattery's counsel contended that the hat should be admitted because "[t]he State can say, oh, yeah, Mr. Slattery could just pick that up and brought it in." The trial court admitted the hat into evidence over the State's objection.

Slattery then testified. According to Slattery, he was walking to catch the bus when he heard loud crashing noises. He then saw a man walking quickly away from the bus shelter. Slattery testified that he then approached the bus shelter, which was in "kind of a state of disarray," and "some of the windows had been broken." Slattery testified, "I had a bit of concern because I immediately assumed that the noises that I heard were the result of the windows being broken. . . . I was concerned because I figured a police dispatch might be coming out. I didn't have any choice but staying there since it was the last bus to catch going home."

Prior to trial, it was stipulated that Slattery's three prior residential burglary convictions and one prior conviction for trafficking in stolen property would be admissible in evidence for impeachment purposes should Slattery testify. On cross-examination, the prosecutor asked, "Now, your attorney asked you—and I'll be brief—you testified that you have been convicted of some crimes of dishonesty; is that correct?" At this point, Slattery's counsel objected:

[SLATTERY'S COUNSEL]: Objection, Your Honor.

> Mischaracterization of a determination for the jury.
>
> THE COURT: That is the basis why I think certain crimes are allowed to be testified to. So I'll overrule that objection.
>
> [SLATTERY]: Actually before this proceeding I had never heard the term "crimes of dishonesty," but if those crimes do fall in that category, then, yes.
>
> [PROSECUTOR]: You're not contesting that residential burglary is a crime of dishonesty?
>
> [SLATTERY'S COUNSEL]: Objection. Relevance, Your Honor.
>
> THE COURT: I think we have gone into that far enough.
>
> [PROSECUTOR]: For those crimes you received a first offender waiver, right?
>
> [SLATTERY]: Yes.
>
> [PROSECUTOR]: You served 90 days?
>
> [SLATTERY]: Yes.
>
> [PROSECUTOR]: It was less than the standard range, right?
>
> [SLATTERY'S COUNSEL]: Objection. Outside the scope of what is allowed.
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> THE COURT: I'll sustain the objection. I think the fact of the conviction is significant for the reasons that are indicated and there needs to be no further questions concerning anything to do with the crimes or punishment of the crime.
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> [PROSECUTOR]: May we have a very brief sidebar?
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> THE COURT: No.
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> [PROSECUTOR, directed at SLATTERY]: You indicated a moment ago that you had told the police that somebody had—that you had seen somebody else in the area, right?
>
> [SLATTERY]: Yes.
>
> [PROSECUTOR]: And they arrested you anyway, right?
>
> [SLATTERY]: Yes.
>
> [PROSECUTOR]: No further questions.

Slattery then moved for a mistrial based on his contention that the trial court's rulings constituted impermissible comments on the evidence. He later moved for a new trial on the same basis. The court denied both motions. Prior to closing arguments, the court instructed the jury that "[i]f it appeared to you that I have indicated my personal opinion in any way, either during the trial or in giving

these instructions, you must disregard the apparent comment entirely."[1]

The jury found Slattery guilty as charged.

At sentencing, the trial court imposed a mitigated exceptional sentence, finding that "[t]he amount of property damage done in this case is relatively small. The evidence presented established that it cost $2,644.80 to repair the damage to the bus shelter. While this is more than enough to constitute malicious mischief in the first degree . . . there are other cases of malicious mischief in the first degree where the dollar amount of property damage is much, much greater." The State specifically objected to this factual finding as being unsupported by any admissible evidence. Slattery's counsel responded that, "I think you could take judicial notice of that fact, Your Honor. There are any number of published decisions in books where there are discussions on malicious mischief cases where the damages are fifty thousand, a hundred thousand." The trial court responded, "I'll take judicial notice."

The State argued that the dollar amount in question was clearly above the statutory requirement for the charged offense, to which the trial court responded:

> I appreciate what the State's position is, but I'm also aware that through the Superior Court judges that I have spoken to there is probably going to be some effort made whether it's successful or not to request the legislature to look again at the amounts of money that have been set forth in the various crimes.
>
> I'm thinking, what, 20 years ago they were the same amounts. I mean $1,500 for malicious mischief . . . . It's interesting that somehow that would be the same charge now with all the penalties that go along with it as it was 20 years ago. Property is valued at more now. The same property is valued at more.
>
> What I will do in this case, I'm going to find an exceptional

[1] The instruction given was substantially the same as the pattern jury instruction. See 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 1.02, at 13-15 (2008).

sentence based on the amount of damages.

The trial court also entered the following factual finding:

> Although the defendant has an offender score of 4, because his four prior offenses were all adjudicated on the same day this is only the second time that the defendant is before a Superior Court for sentencing in a felony case. Thus, the enhanced degree of culpability that stems from recidivism is not as great as it would be if the defendant had been before a Superior Court for sentencing on a felony on two, or three, or four prior occasions.

Based on these findings, the court made conclusions of law:

> 5. The multiple offense policy does not distinguish between cases where the offender score is 4 as a result of one prior criminal judgment, and cases where the offender score is 4 as a result of two, three, or four prior criminal judgments.
>
> 6. Under the facts of this case, where the degree of property damage is relatively minor, and where all four of the prior offenses were all adjudicated at the same time, the dramatic increase in the defendant's standard range is not justified by the fact that the defendant had a criminal history with four prior criminal offenses. In this situation, the standard range produced by the multiple offense policy is clearly excessive, because it over-accounts for the harm caused by the offense.

The State appeals the mitigated exceptional sentence, contending that the trial court abused its discretion in granting it based on the justifications stated. Slattery cross-appeals, contending that his conviction must be reversed.

II

In its direct appeal, the State contends that the trial court's mitigated exceptional sentence was based both on an unsupported finding and on erroneous legal conclusions.[2] According to the State, the trial court's factual

[2] "A court may impose a sentence outside the standard range if 'there are substantial and compelling reasons justifying an exceptional sentence.' RCW 9.94A.535. When reviewing an exceptional sentence, an appellate court asks three questions: (1) are the reasons supplied by the sentencing judge supported by the record; (2) do those reasons justify a sentence outside the standard range; and (3) was the sentence clearly excessive or too lenient. The court applies the

finding that the damage caused by Slattery was "relatively small" is unsupported in the record. The State also contends that the trial court erroneously based its exceptional sentence on the "multiple offense policy" set forth in RCW 9.94A.589. The State is correct in both respects. Nothing properly considered by the trial court supports its factual finding. The trial court also erred by relying on the "multiple offense policy" in relation to Slattery's prior offenses. That policy applies only to multiple current offenses; prior offenses are addressed exclusively by the offender score provisions of the Sentencing Reform Act (SRA).[3] Because the only conclusions of law entered by the trial court to justify Slattery's exceptional sentence improperly rely upon the "multiple offense policy" in relation to prior offenses, remand for resentencing is required.

The parties vigorously dispute whether the trial court's factual finding that "[t]he amount of property damage done in this case is relatively small" was proper. At the outset, it is important to note that the only articulated basis supporting this finding was the trial court's judicial notice of defense counsel's assertion that "[t]here are any number of published decisions in books where there are discussions on malicious mischief cases where the damages are fifty thousand, a hundred thousand."

Slattery argues that our Supreme Court has held that published cases provide an acceptable basis to support a factual finding as to an offense's relative seriousness, citing State v. Solberg, 122 Wn.2d 688, 861 P.2d 460

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clearly erroneous standard to the first question, the de novo standard to the second, and the abuse of discretion standard to the third." State v. Borg, 145 Wn.2d 329, 336, 36 P.3d 546 (2001) (citations omitted); see also RCW 9.94A.585(4).

[3] The Sentencing Reform Act of 1981, chapter 9.94A RCW.

(1993). But Solberg held no such thing. Rather, in reinstating an exceptional sentence vacated by the Court of Appeals, the Supreme Court expressly *disapproved* of the Court of Appeals' reliance upon published appellate opinions as the baseline for determining the relative seriousness of a criminal offense. Solberg, 122 Wn.2d at 704 ("'proportionality' review" of "prior published appellate decisions" is not "a correct inquiry"). In other words, Solberg stands for the proposition opposite that for which Slattery cites to it—that is, the case holds that it is *inappropriate* to determine the comparative seriousness of an offense based on similar offenses described in published appellate opinions, because such opinions necessarily exclude all the "minor cases [that] are resolved by plea bargaining, at the trial court level, or in unpublished appellate decisions." Solberg, 122 Wn.2d at 703.

Moreover, in Solberg, the trial court's factual findings upon which the exceptional sentence had been based—that the defendant had been growing marijuana for use by others and that the grow operation involved a high degree of sophistication and planning—were supported by evidence in the record. 122 Wn.2d at 702, 705-06. The same is true of the other two cases to which Slattery cites. See State v. Wilson, 96 Wn. App. 382, 388-89, 980 P.2d 244 (1999); State v. Jacobson, 92 Wn. App. 958, 964, 965 P.2d 1140 (1998).

Here, the only factual basis that the trial court articulated supporting the imposition of an exceptional sentence, other than the facts stated in published appellate opinions, appears to have been its disagreement with the legislature's

classification of the crime of which Slattery was convicted. The court stated its disagreement with the fact that the classification had not been adjusted for inflation, stated that there would be some effort to convince the legislature to make such an adjustment, acknowledged that such an effort might be unsuccessful, and then departed downward from the sentencing guidelines based on its belief that the offense's first-degree classification threshold was too low. Notably, the trial court did *not* base its sentence on its own knowledge and experience regarding the relative seriousness of the damage caused by Slattery's criminal conduct. In other words, the *only* factual basis supporting Slattery's exceptional sentence appears to be the trial court's substitution of its judgment for that of the legislature.

This being the case, the next question is whether the conclusions of law entered by the trial court, standing alone, justify the departure from the standard sentencing range. They do not.

RCW 9.94A.535(1)(g) provides that a trial court may impose an exceptional sentence below the standard range if "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.589, in turn, deals exclusively with whether "consecutive or concurrent sentences" should be imposed when "a person is to be sentenced for two or more *current* offenses." (Emphasis added.)

Prior convictions are "conviction[s] which exist[ ] before the date of

sentencing for the offense for which the offender score is being computed." RCW 9.94A.525(1). They are expressly not "current offenses." RCW 9.94A.525(1). Prior offenses are used to compute the offender score, which is one of two components (the other is the seriousness level of the offense) that result in the standard sentence range for any given crime. RCW 9.94A.530. RCW 9.94A.525(5)(i) provides a specific and exclusive means for addressing prior offenses that were sentenced together for purposes of computing the offender score—that is, offenses that constituted the "same criminal conduct" are only counted as a single offense. Otherwise, prior offenses, if they are counted, are counted separately.

The trial court erred by concluding that the "multiple offense policy" justified departing from the standard sentence range because Slattery's prior convictions were the subject of a single sentencing proceeding. The multiple offense policy of RCW 9.94A.589 has no bearing on Slattery's present sentence unless his prior offenses constituted the same criminal conduct under the test set forth in RCW 9.94A.525(5)(i). They did not. Otherwise, Slattery's prior offenses are addressed exclusively by the offender score provisions of the SRA.

The trial court did not articulate a proper factual basis for departing from the standard sentence range. The conclusions of law entered by the court to justify its departure from the standard sentence range were legally erroneous. We must remand for resentencing. Of course, on remand, the trial court retains the discretion to depart from the standard sentence range, provided that it gives

sound justifications for doing so.

III

In his cross-appeal, Slattery contends that his conviction must be reversed because the trial court impermissibly commented on the evidence when it ruled on two evidentiary objections. We disagree.

Under article IV, section 16 of the Washington Constitution, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Such statements are prohibited "'to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence.'" State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968) (quoting Heitfeld v. Benevolent and Protective Order of Keglers, 36 Wn.2d 685, 699, 220 P.2d 655 (1950)). But "[a] court does not comment on the evidence simply by giving its reasons for a ruling." In re Det. of Pouncy, 144 Wn. App. 609, 622, 184 P.3d 651 (2008) (citing State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005)), review granted, 165 Wn.2d 1007 (2008).

Slattery does not dispute that the statements by the trial court that he contends were improper—"That is the basis why I think certain crimes are allowed to be testified to" and "I think the fact of the conviction is significant for

the reasons that are indicated"—were made as explanations for rulings on evidentiary objections. Nor does he dispute that those rulings were correct. Rather, he contends that the court expressed opinions as to the quality of the evidence simply because it twice prefaced its rulings with the words "I think."

It is true that not *all* statements made as explanations for evidentiary rulings are permissible under article IV, section 16. For example, the trial court's statement in Lampshire in response to an objection following an overlong examination that "[w]e have been from bowel obstruction to sister Betsy, and I don't see the materiality, counsel," constituted an impermissible expression as to the value of the prior testimony. 74 Wn.2d at 891.

Here, however, the trial court was not expressing its opinion as to any of the evidence presented. Rather, with respect to the first statement, the court correctly identified the reason that the State was permitted to delve into Slattery's prior convictions. That this explanation was preceded by the words "I think" did not change the statement's nature—i.e., an explanation for an evidentiary ruling.

Similarly, with respect to the second statement, the trial court correctly sustained Slattery's objection to the State's attempt to inquire into the sentence imposed on Slattery for his prior convictions. Again, the fact that this explanation was preceded by the words "I think" did not render it an expression of opinion on evidence; at most, it rendered it an opinion on the legal basis for sustaining the objection. The opinion expressed was correct. Moreover, any

confusion was addressed by a proper limiting jury instruction.

There was no error.

IV

Slattery next contends that he was denied his constitutional right to effective assistance of counsel because his trial attorney failed to sufficiently investigate the clothing that Slattery was wearing when he was arrested. However, for purposes of a claim of ineffective assistance of counsel raised in the direct appeal of a criminal conviction, the appellate court will not consider matters outside the record. Contrary to Slattery's contention, the record is insufficient for us to make a determination as to whether Slattery's counsel's performance was deficient. Because, further, Slattery fails to demonstrate that his attorney's performance prejudiced his case, his claim is unavailing.

Where a claim of ineffective assistance of counsel "is brought on direct appeal, the reviewing court will not consider matters outside the trial record." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

> The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.

McFarland, 127 Wn.2d at 335.

Here, other than Slattery's counsel's own assertion that her conduct amounted to ineffective assistance, there is nothing in the trial record indicating that her performance was in fact deficient. Moreover, Slattery's hat—the only piece of physical evidence that Slattery discusses—was actually admitted into evidence. This being so, the only basis that Slattery articulates that could plausibly support a finding of ineffective assistance is the fact that his mother was unable to testify because she was not timely disclosed as a witness. But there is nothing in the record that indicates that Slattery's mother would have testified in the first place, or what her testimony would have been had she testified. The proper mechanism to assert a claim of ineffective assistance of counsel based on such outside-the-record assertions is a personal restraint petition.

In addition to basing his contention on matters outside the record, Slattery has failed to demonstrate that his attorney's alleged failure to investigate actually prejudiced his case. An attorney's conduct cannot provide the basis for a claim of ineffective assistance unless "there is a probability that the outcome would be different *but for* the attorney's conduct." State v. Benn, 120 Wn.2d

631, 663, 845 P.2d 289 (1993) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). A reasonable probability of prejudice sufficient to justify reversal "'is a probability sufficient to undermine confidence in the outcome.'" Knowles v. Mirzayance, 556 U.S. __, 129 S. Ct. 1411, 1422, 173 L. Ed. 2d. 251 (2009) (quoting Strickland, 466 U.S. at 694). It is possible for defense counsel's failure to investigate evidence to provide the basis for a showing that defense counsel's performance was deficient, State v. Crawford, 159 Wn.2d 86, 97-98, 147 P.3d 1288 (2006), but "[i]n evaluating prejudice, 'ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case.'" In re Pers. Restraint of Davis, 152 Wn.2d 647, 739, 101 P.3d 1 (2004) (quoting Rios v. Rocha, 299 F.3d 796, 808-09 (9th Cir. 2002)).

Here, Slattery fails to show that he was prejudiced by his attorney's purported investigatory failures. Again, the only physical evidence that might have been excluded as a result of deficient attorney conduct—Slattery's hat—was in fact admitted, over the State's objection.

Next, the clothing descriptions offered by Lieseki and Snow were of little relative weight. Lieseki continuously observed Slattery from the time that he was engaged in vandalizing the bus shelter until the police initiated contact with him. She thereafter walked outside and positively identified Slattery at the scene.

Finally, Slattery has provided no basis in the record upon which to conclude that testimony about his clothing would actually have been favorable to

him. Assuming that the hat he presented to the court was in fact the hat that he was wearing when he was arrested, it is entirely possible that Lieseki and Snow would have testified that it was the hat that they saw him wearing on the night in question. Slattery's assumption to the contrary is pure speculation.

Slattery's claim does not warrant relief.

V

Slattery next contends that the prosecutor engaged in misconduct by asking of Slattery the question, following Slattery's description of his interaction with the police, "And they arrested you anyway, right?" According to Slattery, this was misconduct because the question amounted to eliciting improper opinion testimony from a police officer that Slattery was lying. In support of this theory, Slattery correctly cites State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995), for the proposition that "no witness may give an opinion on another witness'[s] credibility."

The problem with Slattery's theory, which is meritless, is that (1) the testimony elicited was that of Slattery himself, not another witness, and (2) the testimony described events, not opinions.[4]

There was no misconduct.[5]

VI

[4] Even if the prosecutor's question had been improper, which it was not, it certainly was not so "'flagrant and ill-intentioned'" that it could not have been cured by a jury instruction. Given that Slattery failed to object to the question, this is the standard that he would have to meet to warrant reversal on appeal. State v. Fisher, __ Wn.2d __, 202 P.3d 937, 947 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 858, 147 P.3d 1201 (2006)).

[5] Slattery also contends that cumulative error at trial requires reversal. But he has not identified any errors; there is nothing to accumulate.

Finally, Slattery contends that the trial court erred by failing to rule that one of his prior convictions for residential burglary and his prior conviction for trafficking in stolen property constituted the same criminal conduct and, accordingly, by failing to count them as a single offense for purposes of Slattery's offender score calculation. This argument is without merit.

RCW 9.94A.525(5)(i) instructs that, in computing the offender score for purposes of calculating a convicted person's standard sentence range, prior convictions should be counted separately unless, "using the 'same criminal conduct' analysis found in RCW 9.94A.589(1)(a) . . . the court finds that they shall be counted as one offense." Under RCW 9.94A.589(1)(a), "'Same criminal conduct,' . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim."

Here, the offenses have different intent elements. Residential burglary requires that a person unlawfully enter a dwelling "with intent to commit a crime against a person or property therein." RCW 9A.52.025(1). Trafficking in stolen property in the first degree requires that a person "knowingly traffics in stolen property." RCW 9A.82.050(1). The events giving rise to the respective convictions also occurred at different times and in different places. The offenses did not constitute the same criminal conduct.

There was no error.

Conviction affirmed. Remanded for resentencing.

Dwyer, A.C.J.

WE CONCUR:

Appelwick, J.

Leach, J.